

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
)
)
 v.)
)
)
ALAN BASS,)
)
)
 Defendant.)

Cr. ID. No. 83000508DI

Submitted: September 23, 2021

Decided: December 15, 2021

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED**

Maria Knoll, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Patrick J. Collins, Esquire, Attorney for Defendant Alan Bass.

PARKER, Commissioner

This 15th day of December 2021, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

INTRODUCTION

On or about June 25, 2015, the United States Department of Justice/Federal Bureau of Investigation ("USDOJ/FBI") notified the Attorney General of Delaware that the microscopic hair comparison ("MHC") evidence used at Defendant Alan Bass' trial in 1983 "exceeded the limits of science".¹ The USDOJ/FBI advised that the testimony of the F.B.I. MHC expert exceeded the limits of science by stating or implying that the evidentiary hair at issue could be associated with a specific individual to the exclusion of all others.²

The USDOJ/FBI advised that other than to provide notice that the MHC evidence used at trial in this case went too far, it took no position regarding the materiality of the error in this case.³

The issue presented in this motion is the materiality of that error in this case.

By the dictates of Rule 61, Bass' current Rule 61 motion, his seventh, is procedurally barred, pursuant to Rule 61(d)(2)(i), unless he establishes that this

¹ Superior Court Docket Nos. 128 & 129 are the two-part Appendix to Defendant's Rule 61 motion. In the Appendix, the trial transcripts are all included. The citations in this Opinion to the trial transcripts will be made to the Appendix with few exceptions.

See, Superior Court Docket No. 128, Defendant's Appendix to Rule 61 motion at A17-A81.

² Superior Court Docket No. 128, Defendant's Appendix to Rule 61 motion at A20-A22.

³ Superior Court Docket No. 128, Defendant's Appendix to Rule 61 motion at A18.

new evidence, the overstatements of the FBI MHC expert at trial, creates a strong inference that Bass is actually innocent in fact of the acts underlying the charges of which he is convicted.⁴ Eligibility for relief under Superior Court Criminal Rule 61(d)(2)(i) depends on whether the defendant can meet his burden of establishing a strong inference of actual innocence.⁵

For the reasons discussed below, Bass has not met his burden of proof in this regard. Bass has not met his burden to establish that the new evidence creates a strong inference that Bass is actually innocent in fact of the acts underlying the charges for which he was convicted. Bass has not established that had it not been for the overstatements of the FBI MHC expert at trial the outcome of his trial would probably have been different and that he probably would have been acquitted.

BACKGROUND AND PROCEDURAL HISTORY

In January 1983, Bass was charged in an eleven-count indictment for a variety of crimes stemming from attacks on three separate women occurring within a ten-month period between November 1981 and August 1982.

⁴ Del.Super.Ct.Crim.R. 61(d)(2)(i).

⁵ Del.Super.Ct.Crim.R. 61(d)(2)(i).

In June 1983, a Superior Court jury convicted Bass of two counts of Rape First Degree, three counts of Kidnapping First Degree, two counts of Robbery First Degree, Attempted Robbery First Degree, two counts of Burglary Second Degree, and Burglary Third Degree.

On January 13, 1984, the Superior Court sentenced Bass to a total of five life sentences plus forty-five (45) years of imprisonment.

On direct appeal to the Delaware Supreme Court, Bass requested that the trial be transcribed, excluding opening statements and closing arguments.⁶ Those were not transcribed. During transcription of the trial, some pages of the stenographer's notes were lost during a storm and had to be reconstructed using notes of the prosecutors.⁷ Both the Superior Court and, thereafter, the Delaware Supreme Court found that the loss of the stenographer's notes did not require a new trial.⁸

Bass' convictions and sentences were affirmed on direct appeal.⁹

One issue raised on direct appeal was the trial court permitting FBI Agent Podolak to testify about a MHC study where "questioned" hairs were matched with

⁶ Superior Court Docket No. 129, Defendant's Appendix to Rule 61 motion at A599.

⁷ Superior Court Docket No. 129, Defendant's Appendix to Rule 61 motion at A663-91.

⁸ *Bass v. State*, 720 A.2d 540 (Del. 1984)(holding trial court's denial of defendant's motion for new trial was proper where portions of stenographer's notes that were lost amounted to only three pages of the trial transcript and those pages could be recreated using attorney's notes and no issues raised on appeal were discussed in the lost pages).

⁹ *Bass v. State*, 505 A.2d 451 (TABLE) (Del. 1985) No. 14, 1984, slip op. (Del. Sept. 20, 1985) - See, Superior Court Docket No. 129, Defendant's Appendix to Rule 61 motion at A699-708.

“known” hairs 100% of the time. The Delaware Supreme Court found no error in permitting Agent Podolak to testify about the study.¹⁰

Thereafter, Bass filed six prior Rule 61 postconviction relief motions, as well as several federal postconviction motions.¹¹ All of the state court motions were denied or dismissed by the Superior Court, and all of the denials/dismissals were affirmed by the Delaware Supreme Court. All of the federal motions were also denied.¹² Bass most recent motion for postconviction relief was denied in 2014.¹³

Since the denial of Bass’ sixth motion for postconviction relief, the FBI conducted an internal review of its forensic experts’ testimony in the field of

¹⁰ *Bass v. State*, 505 A.2d 451 (TABLE) (Del. 1985) No. 14, 1984, slip op. (Del. Sept. 20, 1985) - See, Superior Court Docket No. 129, Defendant’s Appendix to Rule 61 motion at A703-704.

¹¹ See, *State v. Bass*, 1998 WL 90505 (Del.Super.), *aff’d*, 1989 WL 47282 (Del.) (denying first motion for postconviction relief).

Bass v. Redman, 1988 WL 117516 (Del. Oct. 26, 1988) (affirming denial of petition for writ of habeas corpus).

Bass v. Redman, C.A. No. 89-278, slip op. (D.Del. June 19, 1990) (recommending denial of petition for federal habeas relief); *Bass v. Redman*, No. 91-3043, slip op. (3d Cir. Apr. 5, 1991) (adopting magistrate’s report and recommendation for denial of federal habeas relief).

In re Bass, 1992 WL 183105 (Del.) (dismissing petition for writ of certiorari/mandamus).

State v. Bass, 1993 WL 1488081 (Del.Super.), *aff’d*, 1993 WL 478076 (Del. 1993) (denying second motion for postconviction relief).

Bass v. State, 1998 WL 231270 (Del.) (affirming denial of third motion for postconviction relief).

State v. Bass, 2003 WL 21538107 (Del.Super.), *aff’d*, 2003 WL 21810837 (denying fourth motion for postconviction relief).

Bass v. State, 2013 WL 2398580 (Del.) (affirming denial of fifth motion for postconviction relief).

State v. Bass, 2014 WL 4793005 (Del.Super.) (denial of sixth motion for postconviction relief).

¹² *Id.*

¹³ *State v. Bass*, 2014 WL 4793005 (Del.Super.) (denial of sixth motion for postconviction relief).

MHC. On or about June 25, 2015, the USDOJ sent a letter to the Delaware Attorney General pertaining to the expert MHC testimony of FBI Agent Podolak admitted by the State in this case.¹⁴ The letter informed the State that Bass’ trial was a case where the MHC expert’s testimony “exceeded the limits of science.” Specifically, the USDOJ determined that Agent Podolak “stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeded the limits of science.”¹⁵

In light of the FBI’s disclosure of error, counsel was appointed to represent Bass to review this case and to advocate whether an argument for a strong inference of actual innocence could be made. Following counsel’s review of this case, counsel filed the subject Rule 61 motion on April 26, 2018. The State filed its Response on August 9, 2018. The defense filed a Reply on September 5, 2018.

On December 10, 2018, the defense filed a letter to supplement the record. The submission was to bring to the court’s attention that in another case from 1987 involving errors in the MHC evidence, *State v. Elmer Daniels*,¹⁶ the State filed a motion to dismiss.¹⁷

¹⁴ Superior Court Docket No. 128, Defendant’s Appendix to Rule 61 motion at A17-19.

¹⁵ Superior Court Docket No. 128, Defendant’s Appendix to Rule 61 motion at A18.

¹⁶ Superior Court Docket No. 136- attaching as Exhibit A the motion to dismiss in *State v. Elmer Daniels*, ID No. 87002394DI.

¹⁷ *Id.*

After briefing was completed on the Rule 61 motion, the parties became aware that the hair evidence was still available from Bass' 1983 trial. On February 7, 2019, the parties worked out a stipulation for the transfer of the evidence to the FBI for additional testing.¹⁸ First, the FBI conducted additional MHC testing. Next, DNA testing was performed of certain samples using a technique involving mitochondrial DNA (mtDNA). The defense retained an expert to review the FBI lab results.

Thereafter, the parties agreed to a Stipulation of the mtDNA results and Order providing for supplemental briefing, which the Court approved on September 23, 2020.¹⁹ After the supplemental briefing was completed, a hearing was held on September 23, 2021.

For the sake of completeness, it is noted that the transcripts of the opening statements and closing summations are unavailable. These proceedings were never previously transcribed. At this late date, over 30 years after the trial in 1983, one court reporter has apparently passed away and the other does not have any recordings of these proceedings.²⁰

¹⁸ Superior Court Docket No. 139- Stipulation and Order for the transfer of the MHC evidence to the FBI for testing.

¹⁹ Superior Court Docket No. 149- Stipulation and Order approved September 23, 2020.

²⁰ See, counsels' representations at the September 23, 2021, hearing on this Rule 61 motion.

FACTS- WITHOUT REFERENCE TO HAIR TESTIMONY

Since the issue presented herein is how material to Bass' conviction was the error of the MHC evidence, the facts as set forth below in this section will not reference the MHC evidence in any respect.

Defendant Alan Bass was arrested on November 1982 and charged with crimes stemming from robberies and sexual attacks on three women that occurred over a period of ten months between November 1981 and August 1982. At the time of his arrest, Bass was 5'11" in height, weighed 152 pounds, and was 32 years of age (born in July 1950).²¹ At the time of trial in June 1983, Bass had gained an additional 15-20 pounds from his weight at the time of his arrest in November 1982.²²

Bass and Loretta Schoell knew each other for about 11 years. Bass lived with Loretta Schoell at the Stoneybrook Apartments in Claymont, Delaware from October 31, 1981 until December 2, 1981. He then moved out of the State of Delaware to New Jersey. Bass returned to Delaware on June 6, 1982, and resumed living with Loretta Schoell, until September 1982.²³

²¹ Page C40 from the June 7, 1983, trial transcript was inadvertently omitted from the Defendant's Appendix attached as Docket Nos. 128 & 129. See, June 7, 1983, Trial Transcript, at pgs. C39-40, for the physical description of Defendant Bass at the time of his arrest.

²² Superior Court Docket No. 128, Defendant's Appendix at A325-326.

²³ Superior Court Docket No. 128, Defendant's Appendix at A340-42.

The first attack at issue occurred on November 10, 1981, about a mile from where Bass was living in Delaware. The second attack occurred on July 10, 1982, after Bass had returned to Delaware and had resumed living in Delaware with Loretta Schoell. The third attack occurred on August 26, 1982, while Bass was living with Loretta Schoell in Delaware. All three of the attacks occurred within a few miles from where Bass was living in Delaware.

Loretta Schoell and Bass both testified at trial that in the eleven years that Loretta Schoell knew Bass, he was not employed. Bass supported himself by stealing checks and credit cards from office workers in office buildings.²⁴ Schoell was involved with Bass in stealing and cashing checks.²⁵

Both Bass and Schoell testified that Bass would always dress like an office worker. He did his best not to stand out. He always dressed “neat as a pin” and always tried to blend into an office environment. He wore nice clothes that were well-pressed.²⁶

Bass testified at trial that he never carried a weapon because if he was ever caught stealing from an office, he would not also be facing a weapon charge(s).²⁷

²⁴ Superior Court Docket No. 128, Defendant’s Appendix at A349-50, A354, A358-359; Superior Court Docket No. 129, Defendant’s Appendix at A518-526, 533-A535.

²⁵ Superior Court Docket No. 128, Defendant’s Appendix at A344-351, A358.

²⁶ Superior Court Docket No. 128, Defendant’s Appendix at A353-355; A359; Superior Court Docket No. 129, Defendant’s Appendix at A519, A525.

²⁷ Superior Court Docket No. 129, Defendant’s Appendix at A525.

S.K.²⁸ Attack

On Tuesday, November 10, 1981, S.K., a twenty-year old female was working alone at around 7 p.m. at a law office in North Wilmington.²⁹ As she was talking to a friend on the telephone, a slender, well-dressed black male wearing surgical gloves and carrying a bag entered while she sat at her desk talking to her friend.³⁰ Upon S.K. asking the man if she could help him, he ran to her and shoved an object (which she thought to be a switchblade but turned out to be a screwdriver) into her side.³¹ S.K.'s desk drawer with petty cash was open, and the man demanded the money.³² He directed S.K. not to look at him and hung up the phone.³³

After learning that she had been talking to a friend, he had her call back and explain that she had to hang up because someone had come in and that she would call back.³⁴ After the man hung up the phone again, he went through S.K.'s purse and took her watch, bracelet and gold ring.³⁵

²⁸ The sexual assault victims are all referenced by only their initials.

²⁹ Superior Court Docket No. 128, Defendant's Appendix at A131, 135, 301.

³⁰ Superior Court Docket No. 128, Defendant's Appendix at A134-137.

³¹ Superior Court Docket No. 128, Defendant's Appendix at A135, A198.

³² Superior Court Docket No. 128, Defendant's Appendix at A137.

³³ Superior Court Docket No. 128, Defendant's Appendix at A138.

³⁴ Superior Court Docket No. 128, Defendant's Appendix at A139.

³⁵ Superior Court Docket No. 128, Defendant's Appendix at A140.

The assailant locked the front door and led S.K. to a conference room and had her lie face down on the floor and lift her sweater so she could not see.³⁶ He tied S.K.'s feet with a telephone wire from the office and, after standing her up, forced her to remove her pants and underpants while he did the same.³⁷ The assailant had S.K. lie down this time facing up with her face still covered and forced her to help him achieve vaginal penetration which lasted for about twenty to thirty seconds.³⁸ He had problems maintaining an erection.³⁹ He did not ejaculate.⁴⁰

After the man got up and pulled his clothes on, he allowed S.K. to dress herself.⁴¹ In order to do this, he allowed her to take the sweater off her head, at which time she caught a glimpse of the man's face.⁴² S.K. had also seen the man's face when he first entered the office.⁴³ He stuck her again with an object and ordered her to sit in a chair.⁴⁴ He placed a sweater belonging to another secretary over her head, put the sweater in her mouth and tied it around her neck.⁴⁵ He tied S.K.'s hands behind her back, told her not to call the police, and left.⁴⁶ S.K. untied

³⁶ Superior Court Docket No. 128, Defendant's Appendix at A140-141.

³⁷ Superior Court Docket No. 128, Defendant's Appendix at A141-43, 303-04.

³⁸ Superior Court Docket No. 128, Defendant's Appendix at A144-45.

³⁹ Superior Court Docket No. 128, Defendant's Appendix at A144.

⁴⁰ Superior Court Docket No. 128, Defendant's Appendix at A145.

⁴¹ Superior Court Docket No. 128, Defendant's Appendix at A145.

⁴² Superior Court Docket No. 128, Defendant's Appendix at A135, 145.

⁴³ Superior Court Docket No. 128, Defendant's Appendix at A135, 145.

⁴⁴ Superior Court Docket No. 128, Defendant's Appendix at A146.

⁴⁵ Superior Court Docket No. 128, Defendant's Appendix at A146.

⁴⁶ Superior Court Docket No. 128, Defendant's Appendix at A146, 148.

herself and called her boyfriend and employer. Her boyfriend arrived minutes later, followed by the police shortly thereafter.⁴⁷

S.K. described her assailant as a black male with a dark complexion and slender build, small-boned, twenty to thirty years old, 5'8" to 5'10", with a possible mustache, and having a deep, soft-spoken voice she associated with a black male.⁴⁸ He wore a black sport coat, a white turtleneck, a black golfer's hat covering his forehead, dark dress trousers, and old-fashioned black plastic frame sunglasses.⁴⁹ The police found a screwdriver on the floor next to the chair where S.K. had been tied up.⁵⁰

S.K. helped the police create a composite sketch of her assailant through hypnosis, but she was not fully confident of the sketch.⁵¹ In December 1981, a police detective conducted a live physical lineup with S.K. consisting of six black males. Bass was not included in the live lineup.⁵² When asked if anyone in the line-up resembled the rapist and, if so, to what extent, S.K. rated one of the individuals an "eight" on a scale of one to ten. She did not positively identify her assailant.⁵³

⁴⁷ Superior Court Docket No. 128, Defendant's Appendix at A148.

⁴⁸ Superior Court Docket No. 128, Defendant's Appendix at A116, 136-37, 186-87.

⁴⁹ Superior Court Docket No. 128, Defendant's Appendix at A116, 136, 186.

⁵⁰ Superior Court Docket No. 128, Defendant's Appendix at A198.

⁵¹ Superior Court Docket No. 128, Defendant's Appendix at A160-61, 173.

⁵² Superior Court Docket No. 128, Defendant's Appendix at A188, 190.

⁵³ Superior Court Docket No. 128, Defendant's Appendix at A188, 190-91.

In October 1982, the detective conducted a photographic lineup with S.K. that included Bass' photo.⁵⁴ S.K. was again unable to make an identification.⁵⁵

At the trial in June 1983, when S.K. saw Bass, she identified him as her assailant.⁵⁶ She explained that she had not seen him in person after the attack and did not believe any of the photos provided to her "really show[ed] it all."⁵⁷

Bass testified at trial that he had never seen S.K. prior to coming to court and did not rape or rob her.⁵⁸

A.S.'s Attack

On Friday, July 2, 1982, Bass gave Loretta Schoell a check that belonged to William Stevens which she, in turn, forged and cashed that same day.⁵⁹ She cashed the check within one or two hours of receiving it from Bass.⁶⁰ William Stevens worked at an insurance company in Claymont, Delaware. His checkbook had been stolen from his desk along with a dictating machine.⁶¹ A dictating machine that matched the description, and was the same brand and model, of the dictating machine stolen from Mr. Stevens was found in Ms. Schoell's car.⁶²

⁵⁴ Superior Court Docket No. 128, Defendant's Appendix at A191-93.

⁵⁵ Superior Court Docket No. 128, Defendant's Appendix at A196.

⁵⁶ Superior Court Docket No. 128, Defendant's Appendix at A155, 174-75.

⁵⁷ Superior Court Docket No. 128, Defendant's Appendix at A174.

⁵⁸ Superior Court Docket No. 129, Defendant's Appendix at A536.

⁵⁹ Superior Court Docket No. 128, Defendant's Appendix at A344-45.

⁶⁰ Superior Court Docket No. 128, Defendant's Appendix at A344-45.

⁶¹ Superior Court Docket No. 128, Defendant's Appendix at A334, 338

⁶² Superior Court Docket No. 128, Defendant's Appendix at A312-13, 337; Superior Court Docket No. 129, Defendant's Appendix at A443-444.

Eight days later, on Saturday, July 10, 1982, twenty-six-year-old A.S., a female, was working alone on a Saturday morning for the same insurance company where William Stevens worked in Claymont, Delaware.⁶³ At around 9:30 a.m., she heard footsteps in the hallway outside her office and, a few seconds later, a well-dressed, thin black man appeared in her office doorway.⁶⁴ He held a screwdriver and had draped a woman's cardigan sweater over his head.⁶⁵ He appeared very excited and told her in an agitated manner to keep quiet.⁶⁶ He approached A.S. at her desk, shoved the screwdriver into her side, grabbed her wrist, and told her to look at the floor and not at him.⁶⁷ Before the man pushed her head down, A.S. had an opportunity to observe him for some ten to thirty seconds.⁶⁸

The assailant asked if A.S. had any money.⁶⁹ A.S. removed a change purse from her pocketbook and asked if he wanted her checks.⁷⁰ The man grabbed her purse and emptied out its contents on the desk.⁷¹ He tore the strap from the

⁶³ Superior Court Docket No. 128, Defendant's Appendix at A217-20, 301.

⁶⁴ Superior Court Docket No. 128, Defendant's Appendix at A223-25.

⁶⁵ Superior Court Docket No. 128, Defendant's Appendix at A223-24, 228.

⁶⁶ Superior Court Docket No. 128, Defendant's Appendix at A226.

⁶⁷ Superior Court Docket No. 128, Defendant's Appendix at A226, 228.

⁶⁸ Superior Court Docket No. 128, Defendant's Appendix at A206.

⁶⁹ Superior Court Docket No. 128, Defendant's Appendix at A227.

⁷⁰ Superior Court Docket No. 128, Defendant's Appendix at A227.

⁷¹ Superior Court Docket No. 128, Defendant's Appendix at A227-28.

pocketbook, put his sweater over her head, and gagged her by tying it.⁷² A.S. could still see the floor and his gray shoes through the bottom of the sweater.⁷³

The assailant took A.S. down the hall and looked in other offices.⁷⁴ He returned with her to the front office and asked her to point out where the exits were located.⁷⁵ After she identified a nearby exit, the man led A.S. to a conference room where he pushed her to the floor and demanded her wedding and engagement rings.⁷⁶ When she refused, he threatened to kill her.⁷⁷ When she struggled with him, the man punched her in the eye and took them.⁷⁸ She stopped struggling. He took the rings and tied her hands and feet.⁷⁹ She was face down and the assailant told her to roll over.⁸⁰ Suspecting she might be raped, A.S. asked him to leave her alone and was told to keep quiet.⁸¹ At this point, though, the man seemed calmer and quieter than previously.⁸²

With A.S. tied up on the floor, the assailant proceeded to undress her from the waist down.⁸³ He then removed his pants and vaginally raped her.⁸⁴ The

⁷² Superior Court Docket No. 128, Defendant's Appendix at A228-29.

⁷³ Superior Court Docket No. 128, Defendant's Appendix at A229.

⁷⁴ Superior Court Docket No. 128, Defendant's Appendix at A229-30.

⁷⁵ Superior Court Docket No. 128, Defendant's Appendix at A230.

⁷⁶ Superior Court Docket No. 128, Defendant's Appendix at A231.

⁷⁷ Superior Court Docket No. 128, Defendant's Appendix at A231.

⁷⁸ Superior Court Docket No. 128, Defendant's Appendix at A232.

⁷⁹ Superior Court Docket No. 128, Defendant's Appendix at A232-33.

⁸⁰ Superior Court Docket No. 128, Defendant's Appendix at A232.

⁸¹ Superior Court Docket No. 128, Defendant's Appendix at A232-33.

⁸² Superior Court Docket No. 128, Defendant's Appendix at A233.

⁸³ Superior Court Docket No. 128, Defendant's Appendix at A232-33.

⁸⁴ Superior Court Docket No. 128, Defendant's Appendix at A234.

assailant had trouble penetrating her and had trouble maintaining an erection.⁸⁵ The penetration lasted only about 60-90 seconds when the assailant gave up, seemed disgusted and said, “forget it.”⁸⁶ He then proceeded to dress himself and A.S.⁸⁷ The assailant rolled A.S. back on her stomach and tied her feet again because they were loose.⁸⁸ He covered her with a raincoat, said he was going to look through her pocketbook again, and left.⁸⁹

After lying there for about an hour and hearing nothing, A.S. untied her hands and waited a few more minutes to see if the assailant was still in the office.⁹⁰ She then ran out of the office building to a nearby restaurant where she had an employee call the police and her husband.⁹¹

A.S. described her assailant as a black male with a medium or dark complexion and slender build, in his early thirties, 5’11” to 6’ in height, and having an older sounding voice.⁹² He had a thin jaw line and hollow cheeks with a very thin growth of hair on his chin.⁹³ In addition to the cardigan sweater draped over his head, he wore black-framed plastic sunglasses with dark lenses, and possibly a

⁸⁵ Superior Court Docket No. 128, Defendant’s Appendix at A234.

⁸⁶ Superior Court Docket No. 128, Defendant’s Appendix at A234-35.

⁸⁷ Superior Court Docket No. 128, Defendant’s Appendix at A235.

⁸⁸ Superior Court Docket No. 128, Defendant’s Appendix at A235-36.

⁸⁹ Superior Court Docket No. 128, Defendant’s Appendix at A236.

⁹⁰ Superior Court Docket No. 128, Defendant’s Appendix at A236-37.

⁹¹ Superior Court Docket No. 128, Defendant’s Appendix at A238.

⁹² Superior Court Docket No. 128, Defendant’s Appendix at A224-25, 265, 297.

⁹³ Superior Court Docket No. 128, Defendant’s Appendix at A224, 297.

short-sleeved shirt with gray or dark-colored polyester pants.⁹⁴ He also wore medium gray slip-on shoes with a soft crepe sole.⁹⁵

A.S. helped police create a composite sketch of her assailant.⁹⁶ A.S. was dissatisfied with the sketch because her assailant's cheeks were hollower, and the sketch depicted him with a goatee.⁹⁷ In July 1982, a police detective showed A.S. a photographic lineup that included a photo of Bass from 1978.⁹⁸ A.S. chose Bass' photo and said that his weight and facial structure were similar to her assailant.⁹⁹ A.S. also selected another photo and said the person likewise resembled her assailant.¹⁰⁰

In October 1982, the detective conducted a second lineup with A.S. that included a more recent photo of Bass.¹⁰¹ A.S. narrowed her selection to two persons, including Bass.¹⁰² A.S. said that Bass looked the most like her assailant.¹⁰³ The detective then told A.S. that Bass was the suspect.¹⁰⁴ Having already told A.S. that Bass was the suspect, the detective aborted a third photographic lineup.¹⁰⁵

⁹⁴ Superior Court Docket No. 128, Defendant's Appendix at A205, 224-25, 297.

⁹⁵ Superior Court Docket No. 128, Defendant's Appendix at A225-26, 297.

⁹⁶ Superior Court Docket No. 128, Defendant's Appendix at A240.

⁹⁷ Superior Court Docket No. 128, Defendant's Appendix at A240.

⁹⁸ Superior Court Docket No. 128, Defendant's Appendix at A307, 309.

⁹⁹ Superior Court Docket No. 128, Defendant's Appendix at A308.

¹⁰⁰ Superior Court Docket No. 128, Defendant's Appendix at A309.

¹⁰¹ Superior Court Docket No. 128, Defendant's Appendix at A309-10.

¹⁰² Superior Court Docket No. 128, Defendant's Appendix at A311.

¹⁰³ Superior Court Docket No. 128, Defendant's Appendix at A311.

¹⁰⁴ Superior Court Docket No. 128, Defendant's Appendix at A319.

¹⁰⁵ Superior Court Docket No. 128, Defendant's Appendix at A320.

At trial, A.S. testified that Bass was of similar height and build as her assailant, but that Bass seemed heavier and had a mustache.¹⁰⁶ A.S. was unaware whether or not Bass had gained weight.¹⁰⁷

Bass had, in fact, gained an additional 15-20 pounds at trial in June 1983 from his weight at the time of his arrest in November 1982.¹⁰⁸

Bass testified that he could not recall whether he was ever in the building where William Stevens' checks were stolen (which were given by Bass to Loretta Schoell to cash) and further denied attacking A.S. eight days later.¹⁰⁹

S.M.'s Attack

On Friday, July 16, 1982, the employer of S.M., a thirty-year-old female, was hosting an open house party/reception at the Hagley Building in the Concord Plaza office complex off of Silverside Road in North Wilmington.¹¹⁰ S.M. placed her pocketbook containing her checks under her desk where it remained for the rest of the day.¹¹¹ At some point, she walked to the ladies' room and passed a tall, thin black man with glasses.¹¹² He stopped, turned around, and looked at her. He was

¹⁰⁶ Superior Court Docket No. 128, Defendant's Appendix at A249-50.

¹⁰⁷ Superior Court Docket No. 128, Defendant's Appendix at A249.

¹⁰⁸ Superior Court Docket No. 128, Defendant's Appendix at A325-326.

¹⁰⁹ Superior Court Docket No. 128, Defendant's Appendix at A544.

¹¹⁰ Superior Court Docket No. 128, Defendant's Appendix at A361, 370, 377-78, 381-82.

¹¹¹ Superior Court Docket No. 128, Defendant's Appendix at A379.

¹¹² Superior Court Docket No. 128, Defendant's Appendix at A380-81.

wearing a blue shirt, along with a light jacket and pants.¹¹³ The next day S.M. noticed that her wallet was missing from her purse. Her checkbook, money and credit cards were all in her wallet.¹¹⁴ One of the checks from her wallet, Check No. 950, was cashed by Loretta Schoell at a Thriftway supermarket.¹¹⁵

Bass testified at trial that he could not recall whether he ever stole from the Hagley Building. Bass could also not specifically recall stealing S.M.'s wallet on July 16, 1982.¹¹⁶

Loretta Schoell, however, did recall that she and Bass had been to the Hagley Building. She testified that she accompanied Bass to the Hagley Building on July 16, 1982.¹¹⁷ She described in detail how they chose the Hagley Building because it is located all the way in the back of the complex and the last building before the wooded area at the end of the complex.¹¹⁸ Their plan was for Bass to go into the building and unobtrusively steal checks from an unwatched pocketbook.¹¹⁹ Bass went into the Hagley Building while she waited in the car. They figured they had less of a chance of being seen in the Hagley Building than any other building in the complex because of the wooded area behind the building.¹²⁰ Bass went into

¹¹³ Superior Court Docket No. 128, Defendant's Appendix at A381.

¹¹⁴ Superior Court Docket No. 128, Defendant's Appendix at A383.

¹¹⁵ Superior Court Docket No. 128, Defendant's Appendix at A347- 348, A381-383

¹¹⁶ Superior Court Docket No. 128, Defendant's Appendix at A544-547.

¹¹⁷ Superior Court Docket No. 128, Defendant's Appendix at A348-352.

¹¹⁸ Superior Court Docket No. 128, Defendant's Appendix at A348-349.

¹¹⁹ Superior Court Docket No. 128, Defendant's Appendix at A349-350.

¹²⁰ Superior Court Docket No. 128, Defendant's Appendix at A349-350.

the building and was gone for about 20 minutes or so. When he came back to the car, he had S.M.'s checks.¹²¹ They left the Hagley Building and immediately drove to the Bank of Delaware branch in Greenville to try to cash a check.¹²² The teller would not cash the check because Schoell did not have sufficient identification.¹²³ They then went back to the car and drove to another Bank of Delaware branch on Union Street and Schoell was successfully able to forge and cash a check.¹²⁴ Another one of the checks, Check No. 950, Schoell was successfully able to forge and cash at the Thriftway supermarket.¹²⁵

On Thursday, August 26, 1982, S.M. was alone at work.¹²⁶ At approximately 9:00 a.m., she heard someone approaching her from behind.¹²⁷ When she turned around, a tall, thin black man wearing a blue shirt walked up to her and covered her mouth with his hand.¹²⁸ He asked if she had any money.¹²⁹ She said she did not.¹³⁰ He led her down the hallway from behind.¹³¹ She tried to scare the man off by first telling him her supervisor was in the other room.¹³² After that failed, she told him the police and the Bank of Delaware chief investigator

¹²¹ Superior Court Docket No. 128, Defendant's Appendix at A350.

¹²² Superior Court Docket No. 128, Defendant's Appendix at A350-351.

¹²³ Superior Court Docket No. 128, Defendant's Appendix at A350-351.

¹²⁴ Superior Court Docket No. 128, Defendant's Appendix at A351.

¹²⁵ Superior Court Docket No. 128, Defendant's Appendix at A351.

¹²⁶ Superior Court Docket No. 128, Defendant's Appendix at A369.

¹²⁷ Superior Court Docket No. 128, Defendant's Appendix at A369-370.

¹²⁸ Superior Court Docket No. 128, Defendant's Appendix at A370, 374.

¹²⁹ Superior Court Docket No. 128, Defendant's Appendix at A370.

¹³⁰ Superior Court Docket No. 128, Defendant's Appendix at A370.

¹³¹ Superior Court Docket No. 128, Defendant's Appendix at A370.

¹³² Superior Court Docket No. 128, Defendant's Appendix at A371.

were coming to investigate the theft of her pocketbook that had been stolen a couple of weeks before.¹³³

The man took S.M. into a dark, windowless room.¹³⁴ The man hit her on the head with his fist and told her to kneel down which she did.¹³⁵ She lost control of her bladder and urinated.¹³⁶ After she lost control of her bodily functions, she heard clothes rustling and the door at the far end of the room shut.¹³⁷ She got up to see if he had left.¹³⁸ When she reached the door, she locked herself in the office.¹³⁹ The assailant was in S.M.'s office a total of about 3-5 minutes from the time he first came in and grabbed her to the time he left.¹⁴⁰ She armed herself with a metal object and called the police.¹⁴¹

The police then contacted Roger Reynolds, who worked in the security office for the Concord Plaza office complex. The security office was located in the same building and on the second floor of S.M.'s building.¹⁴² Within minutes, Reynolds, the security officer went to S.M.'s office and learned about the attack

¹³³ Superior Court Docket No. 128, Defendant's Appendix at A371.

¹³⁴ Superior Court Docket No. 128, Defendant's Appendix at A371, 374.

¹³⁵ Superior Court Docket No. 128, Defendant's Appendix at A372-373.

¹³⁶ Superior Court Docket No. 128, Defendant's Appendix at A373.

¹³⁷ Superior Court Docket No. 128, Defendant's Appendix at A373.

¹³⁸ Superior Court Docket No. 128, Defendant's Appendix at A373.

¹³⁹ Superior Court Docket No. 128, Defendant's Appendix at A373.

¹⁴⁰ Superior Court Docket No. 128, Defendant's Appendix at A374.

¹⁴¹ Superior Court Docket No. 128, Defendant's Appendix at A376.

¹⁴² Superior Court Docket No. 128, Defendant's Appendix at A386-87, 389.

from her.¹⁴³ He checked the men's restroom in the building- approximately thirty to thirty-five feet away from S.M.'s office- to see if anyone was in there.¹⁴⁴ Reynolds noticed that there was a man in the bathroom stall and that the man was not using the toilet.¹⁴⁵ Reynolds noticed the man in the toilet stall was wearing grey suede shoes with a very flat sole and heel.¹⁴⁶ The man stood up and Reynolds could see that the stall was occupied by a black male, approximately 6' tall, with a dark complexion and a bushy beard or sideburns.¹⁴⁷ The man's hair was approximately two inches long, perfectly cropped and symmetrical.¹⁴⁸

Christine Shaw, who also worked in the same building as S.M., passed a tall black man in the hallway at approximately 9:00 a.m. as the man was coming from the doorway of the office where S.M. worked.¹⁴⁹ The man said "hello" to her as he passed her in the hallway.¹⁵⁰ She described him as neatly dressed in dark-rimmed, tinted glasses, a light blue shirt and light blue tweed pants, around twenty to thirty-five years old, slim build, approximately 6' tall in height, weighing 130 pounds, clean-shaven, and having a short to medium-length afro.¹⁵¹

¹⁴³ Superior Court Docket No. 128, Defendant's Appendix at A389-90.

¹⁴⁴ Superior Court Docket No. 128, Defendant's Appendix at A390-391.

¹⁴⁵ Superior Court Docket No. 128, Defendant's Appendix at A390.

¹⁴⁶ Superior Court Docket No. 128, Defendant's Appendix at A391-392.

¹⁴⁷ Superior Court Docket No. 128, Defendant's Appendix at A392-393.

¹⁴⁸ Superior Court Docket No. 128, Defendant's Appendix at A395.

¹⁴⁹ Superior Court Docket No. 129, Defendant's Appendix at A427-429.

¹⁵⁰ Superior Court Docket No. 129, Defendant's Appendix at A433-434.

¹⁵¹ Superior Court Docket No. 129, Defendant's Appendix at A418, 430-431, 434.

S.M. did not see her assailant's face. She could only describe him as 5'10" to 6' with a thin build, having black hands with long, thin fingers, wearing a blue shirt, and having a deep, calm voice.¹⁵²

In October 1982, a state police detective conducted a photographic lineup with Christine Shaw that included Bass' photo.¹⁵³ Shaw positively identified Bass as the person she saw coming from the doorway of S.M.'s office among the eight photos provided to her.¹⁵⁴ The detective then showed Shaw more photos of Bass and disclosed that he was the suspect.¹⁵⁵

In November 1982, a state police detective showed the same photographic lineup to Roger Reynolds that was shown to Shaw.¹⁵⁶ Reynolds chose Bass' photo and indicated that his hair and forehead were similar to that of the man he observed in the men's room.¹⁵⁷ According to Reynolds, the man in the photograph may have been the same person he saw, but, because of the limited view he had of the man in the toilet stall, he could not definitively state it was the same individual.¹⁵⁸

At trial, Christine Shaw again identified Bass as the person that she passed in the hallway as he was coming from the doorway of S.M.'s office.¹⁵⁹

¹⁵² Superior Court Docket No. 128, Defendant's Appendix at A374-376.

¹⁵³ Superior Court Docket No. 129, Defendant's Appendix at A447-448, 450-452.

¹⁵⁴ Superior Court Docket No. 129, Defendant's Appendix at A449.

¹⁵⁵ Superior Court Docket No. 129, Defendant's Appendix at A449-450.

¹⁵⁶ Superior Court Docket No. 129, Defendant's Appendix at A448, 452.

¹⁵⁷ Superior Court Docket No. 129, Defendant's Appendix at A453.

¹⁵⁸ Superior Court Docket No. 129, Defendant's Appendix at A453.

¹⁵⁹ Superior Court Docket No. 129, Defendant's Appendix at A433-434.

At trial, Bass denied attacking S.K., A.S. or S.M.¹⁶⁰ He could not recall whether he ever stole checks from S.M. (which were given to Schoell by Bass and which she in turn forged and cashed) or whether he was ever in the Hagley Building.¹⁶¹ He could not recall whether he ever was in the building or stole checks from the building where A.S. was attacked (which were stolen from a coworker of A.S., eight days before A.S. was attacked, and which were given to Schoell by Bass which Schoell in turn forged and cashed).¹⁶² Although Bass could not recall the locations where he stole checks, he testified that he did not return to the locations where he had previously stolen checks.¹⁶³

FACTS- MICROSCOPIC HAIR COMPARISON (MHC) EVIDENCE

In the previous section, the testimony presented at trial was set forth without any reference to the MHC evidence. In this section, the MHC evidence will be discussed.

In the attack of S.K. and the attack of A.S., articles of clothing, pubic hair combings, and hair samples from Bass and these two victims were sent to the FBI

¹⁶⁰ Superior Court Docket No. 129, Defendant's Appendix at A535-36.

¹⁶¹ Superior Court Docket No. 129, Defendant's Appendix at A544-547.

¹⁶² Superior Court Docket No. 128, Defendant's Appendix at A544-547.

¹⁶³ Superior Court Docket No. 129, Defendant's Appendix at A527.

for hair comparison analysis.¹⁶⁴ FBI forensic examiner Andrew Gary Podolak testified at Bass' trial in June 1983.¹⁶⁵

There was no MHC evidence presented at trial as to S.M.

Agent Podolak testified that his job was to determine first whether there were any hairs present on the items submitted and second to try to make an association between those hairs and a particular individual.¹⁶⁶

Agent Podolak testified that with hair comparison analysis it is the characteristics of the hair that makes it unique and that allows an association to be made of that hair to a particular individual.¹⁶⁷

As to S.M.

No MHC evidence was presented at trial related to this incident in any respect. Agent Podolak did not analyze any MHC evidence related to S.M.'s attack.

As to S.K.

FBI Agent Podolak testified that he found "dark brown pubic hairs of negroid origin" in the pubic combings taken from S.K. He concluded that hair found in the combings of S.K.'s pubic area matched a sample of Bass' pubic hair.

¹⁶⁴ Superior Court Docket No. 128, Defendant's Appendix at A35-43, 52-55.

¹⁶⁵ Superior Court Docket No. 129, Defendant's Appendix at A463-513.

¹⁶⁶ Superior Court Docket No. 128, Defendant's Appendix at A28;

Superior Court Docket No. 129, Defendant's Appendix at A467.

¹⁶⁷ Superior Court Docket No. 128, Defendant's Appendix at A34-35, A80; Superior Court Docket No. 129, Defendant's Appendix at A473-474, A512.

Agent Podolak testified that the “dark brown pubic hairs of negroid origin microscopically matched in every observable characteristic the known pubic hairs of Alan Bass.”¹⁶⁸

As to A.S.

Agent Podolak testified that he compared a hair sample taken from Bass with hairs taken off of A.S.’s clothing and “found a dark brown head hair of negroid origin which microscopically matched the known head hair sample of Alan Bass in every observable microscopic characteristic.”¹⁶⁹

Agent Podolak also compared pubic combings taken following the sexual assault of A.S. with pubic hair taken from Bass and concluded, “I found a dark brown pubic hair of negroid origin which matched in every observable microscopic characteristic the known pubic hairs of Alan Bass.”¹⁷⁰

On cross-examination, Agent Podolak admitted that “hair comparisons do not constitute a basis for absolute personal identification.”¹⁷¹ He said he can tell the race of the person a hair came from, or if the person “has mixed racial characteristics” but cannot tell if the person the hair came from is a man or a woman just from examining a hair.¹⁷²

¹⁶⁸ Superior Court Docket No. 129, Defendant’s Appendix at A491.

¹⁶⁹ Superior Court Docket No. 129, Defendant’s Appendix at A499-501.

¹⁷⁰ Superior Court Docket No. 129, Defendant’s Appendix at A502-03.

¹⁷¹ Superior Court Docket No. 129, Defendant’s Appendix at A506.

¹⁷² Superior Court Docket No. 129, Defendant’s Appendix at A506-507.

Agent Podolak testified that microscopic hair comparisons do not constitute a basis for absolute personal identification, but over the years, “we have persisted in that hair comparisons are a very good means of identification, not a hundred percent, but a very good means of identification.”¹⁷³ Then Agent Podolak, over defense counsel’s objection, discussed a then-recent Minnesota academic study where hair examiners matched “questioned” hair samples with “known” hair samples 100% of the time.¹⁷⁴ Agent Podolak stated that there was “good reliability” or “a very good ability” for an examiner to take a “questioned” hair and match it to an individual criminal suspect.¹⁷⁵

Agent Podolak conceded that he only concluded that the hairs “could have originated” from Bass and could not “positively state” that the hairs came from him.¹⁷⁶ Agent Podolak similarly said that he could not say with a hundred percent surety that they originated from Bass.¹⁷⁷ Agent Podolak acknowledged that “hair comparisons do not constitute a basis for absolute personal identification” and said that hair comparisons “are not like fingerprints” and “are not a hundred percent accurate.”¹⁷⁸ Agent Podolak admitted that hair comparisons are not a hundred

¹⁷³ Superior Court Docket No. 128, Defendant’s Appendix at A75.

¹⁷⁴ Superior Court Docket No. 128, Defendant’s Appendix at A75-78; Superior Court Docket No. 129, Defendant’s Appendix at A510.

¹⁷⁵ Superior Court Docket No. 129, Defendant’s Appendix at A78, A510.

¹⁷⁶ Superior Court Docket No. 129, Defendant’s Appendix at A505-506.

¹⁷⁷ Superior Court Docket No. 129, Defendant’s Appendix at A71.

¹⁷⁸ Superior Court Docket No. 128, Defendant’s Appendix at A67, A71, A74-75; Superior Court Docket No. 129, Defendant’s Appendix at A506.

percent means for identification.¹⁷⁹ Agent Podolak admitted that it was possible to have two hair samples coming from the same person that would not be microscopically similar.¹⁸⁰

On direct appeal, Bass raised the issue of the admissibility of the Minnesota study and claimed that it was potentially misleading and inadmissible under *Frye*¹⁸¹ and Delaware Rule of Evidence 403.¹⁸² The Delaware Supreme Court found that *Frye* did not apply because Agent Podolak's testimony drew limited conclusions from the study and was not dependent upon it.¹⁸³ Citing Agent Podolak's concessions that hair comparisons were not faultless or perfectly accurate, the Court found no fundamental error.¹⁸⁴

On June 25, 2015, the USDOJ/FBI notified the Attorney General of Delaware that the MHC evidence used at Bass' trial in 1983 "exceeded the limits of science".¹⁸⁵ The USDOJ/FBI advised that the testimony of the MHC expert exceeded the limits of science by stating or implying that the evidentiary hair at issue could be associated with a specific individual to the exclusion of all others.¹⁸⁶

¹⁷⁹ Superior Court Docket No. 128, Defendant's Appendix at A74-78.

¹⁸⁰ Superior Court Docket No. 128, Defendant's Appendix at A79-80; Superior Court Docket No. 129, Defendant's Appendix at A511-512.

¹⁸¹ *Frye v. United States*, 293 F. 1013 (D.C. 1923).

¹⁸² Superior Court Docket No. 129, Defendant's Appendix at A701-702.

¹⁸³ Superior Court Docket No. 129, Defendant's Appendix at A703-704.

¹⁸⁴ Superior Court Docket No. 129, Defendant's Appendix at A702-704.

¹⁸⁵ See, Superior Court Docket No. 128, Defendant's Appendix at A17-A81.

¹⁸⁶ Superior Court Docket No. 128, Defendant's Appendix at A18-A23.

The USDOJ/FBI notification listed the specific statements that the FBI reviewers found “exceeded the limits of science.”¹⁸⁷ The letter stated that Agent Podolak’s testimony exceeded the limits of science where he testified that it was his task to “try to make an association between those hairs and the particular individual[;]”¹⁸⁸ where he compared MHC analysis to identifying a human face,¹⁸⁹ where he testified that MHC has “good reliability or a very good ability of an analyst to take a questioned hair and match it to an individual in a crime situation[.]”¹⁹⁰ and where he testified that part of individual identity was the “uniqueness of the individual’s hair.”¹⁹¹

During the pendency of this Rule 61 motion, the parties became aware that the hair evidence was still available from Bass’ 1983 trial. On February 7, 2019, the parties worked out a stipulation for the transfer of the hair evidence to the FBI for additional testing. First, the FBI conducted additional MHC testing. Then, DNA testing was performed using a technique involving mitochondrial DNA (mtDNA). mtDNA testing is performed in those instances where a sample does not contain sufficient DNA for nuclear DNA analysis.

¹⁸⁷ Superior Court Docket No. 128, Defendant’s Appendix at A23.

¹⁸⁸ Superior Court Docket No. 128, Defendant’s Appendix at A28.

¹⁸⁹ Superior Court Docket No. 128, Defendant’s Appendix at A34-35.

¹⁹⁰ Superior Court Docket No. 128, Defendant’s Appendix at A78.

¹⁹¹ Superior Court Docket No. 128, Defendant’s Appendix at A80.

The FBI Laboratory Report dated July 25, 2019 sets forth the results of the additional MHC testing.¹⁹² The FBI Laboratory Report dated January 14, 2020 sets forth the results of the mtDNA testing.¹⁹³

On the MHC retest in July 2019, the July 25, 2019 report provided that as to the A.S. hair samples, due to the limited nature of this hair, no conclusion could be reached as to whether or not Bass can be included as a possible source.

On the MHC retest in July 2019, as to the S.K. sample, a pubic hair that exhibited the characteristics of African ancestry in the sample was microscopically consistent with the hairs of the pubic sample from Bass. Accordingly, based on the FBI re-test, Bass can be included as a possible source of this hair.¹⁹⁴

The FBI Laboratory Report dated January 14, 2020 provided the results of the mtDNA testing. It stated that as to the A.S. samples, the mtDNA sequences obtained from the A.S. samples indicated the presence of a mixture of mtDNA from more than one individual. Because mixtures of mtDNA are not interpretable, no comparisons could be performed.¹⁹⁵

¹⁹² Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B131-134.

¹⁹³ Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B87-B90.

¹⁹⁴ Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B132.

¹⁹⁵ Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B87-B90.

As to the S.K. sample, a partial mtDNA sequence was obtained, nucleotide positions 178-408, and a comparison analysis was able to be performed. The mtDNA sequences obtained from the S.K. sample and Bass were the same within the sequence range. There was a common DNA base at each position at which sequence data were obtained in the sample. If the samples differed at two or more nucleotide positions, Bass would have been excluded as coming from the same source. He was not excluded. Bass cannot be excluded as the source of the S.K. sample.¹⁹⁶

It is possible for up to 1 out of every 135 African-Americans to have the same mtDNA sequence obtained from the S.K. sample and from Bass. Thus, the upper bound frequency estimate of a match in the African-American population is less than a 1% probability (0.74%).¹⁹⁷

The parties stipulated to the mtDNA results.¹⁹⁸

DISCUSSION

In the subject Rule 61 motion, Bass contends that the USDOJ/FBI review identifying inappropriate statements made by the Agent Podolak and the new understanding in forensic science regarding the limitations of MHC evidence for

¹⁹⁶ Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B87-B90.

¹⁹⁷ Superior Court Docket No. 155, State's Supplemental Response to Defendant's Rule 61 Motion, Appendix at B87-B90.

¹⁹⁸ Superior Court Docket No. 149- Stipulation and Order approved September 23, 2020.

individual identification constitute new evidence creating a strong inference that Bass is actually innocent. Bass also contends that the unreliable scientific evidence at trial was a violation of his due process rights.

By the dictates of Superior Court Criminal Rule 61, Bass' current Rule 61 motion, his seventh Rule 61 motion filed over 30 years after his conviction became final, is procedurally barred unless Bass pleads with particularity that new evidence exists that creates a strong inference that Bass is actually innocent in fact of the acts underlying the charges of which he was convicted.¹⁹⁹ Eligibility for relief under Superior Court Criminal Rule 61(d)(2)(i) depends on whether the defendant can meet his burden of establishing a strong inference of actual innocence.²⁰⁰

To satisfy the actual innocence standard under Rule 61(d)(2)(i), a defendant must demonstrate that the evidence (a) will probably change the result if a new trial is granted; (b) was discovered since trial and could not have been discovered before by the exercise of due diligence; and (c) is not merely cumulative or impeaching.²⁰¹

The USDOJ/FBI's disclosure in June 2015 identifying inappropriate statements by the FBI's hair and fiber examiner in this case, and the new

¹⁹⁹ Super.Ct.Crim.R. 61(d)(2).

²⁰⁰ Super.Ct.Crim.R. 61(d)(2).

²⁰¹ *Taylor v. State*, 2018 WL 655627, at *1 (Del.), citing, *Downes v. State*, 771 A.2d 289, 291 (Del.).

understanding in forensic science regarding the limitations of MHC analysis for individual identification, constitute new evidence. The issue presented herein is whether Bass has met his burden to prove that this new evidence creates a strong inference that he is actually innocent in fact of the acts underlying the charges of which he was convicted.

A court must examine the impact of the repudiated evidence and whether, considering the evidence introduced at trial other than what was later repudiated, there was a reasonable probability of a different outcome- that is, an acquittal. The question is essentially whether the trial was fundamentally unfair.²⁰² The court must assess the probative force of the newly presented evidence in connection with evidence of guilt adduced at trial.²⁰³

First, it is important to note that the field of forensic hair analysis has not been discredited.²⁰⁴ The microscopic hair comparison analysis is a valid scientific technique still conducted by the FBI Laboratory.²⁰⁵ MHC comparison is an

²⁰² See, *Pitts v. State*, 591 S.W.3d 786, 791-92 (Ark. 2020).

²⁰³ *Schlup v. Delo*, 516 U.S. 298, 331-32, 115 S.Ct. 851, 869 (1995).

²⁰⁴ *Duckett v. State*, 231 So.3d 393, 399 (Fl. Sup. 2017).

²⁰⁵ See, FBI/DOJ Microscopic Hair Comparison Analysis Review, <http://www.fbi.gov/about-us/lab/scientific-analysis/fbi-doj-microscopic-hair-comparison-analysis-review> (last visited July 5, 2015)(outlining that the FBI continues to refer to visual and microscopic comparisons as perfectly capable of yielding “probative associations” and emphasizes that “microscopic hair comparison analysis is a valid scientific technique still conducted by the FBI Laboratory”).

accepted and reliable scientific method of technique.²⁰⁶ The FBI has not discontinued the use of such analysis.²⁰⁷

Although some of Agent Podolak's testimony at trial overstated the degree of accuracy of his analysis, other statements were well within the bounds of the field. Agent Podolak's overstatements at trial do not undermine the acceptance and reliability of MHC analysis as a science. Although the USDOJ/FBI review concluded that Podolak's testimony contained some erroneous and invalid statements that exceeded the limits of science, Podolak did acknowledge the limits of MHC analysis at trial and defense counsel cross-examined him about those limits.

When the MHC samples were re-tested in 2019, the re-test did not exonerate Bass in any respect. From the A.S. samples no conclusions could be drawn. From the S.K. sample, Bass was still included as a source of the pubic hair since the sample remained microscopically consistent with the hairs of the pubic sample from Bass.

The results of the mtDNA testing further corroborated the MHC analysis. The partial mtDNA sequence obtained from the S.K. sample matched Bass. If the samples differed at two or more nucleotide positions, Bass would have been

²⁰⁶ *Brookins v. State*, 922 A.2d 389, 393 (Del. 2007).

²⁰⁷ *Id.*

excluded as a source. He was not excluded. There was less than a 1% probability of a match of this partial mtDNA sequence and Bass was a match.

In the subject motion, Bass contends that the mtDNA results provide less reliable DNA testing than nuclear DNA testing. Here, nuclear DNA testing could not be performed because of the sample size. While other types of DNA testing may be even more compelling and, had nuclear DNA testing been performed, and found to be a match, that would, in all likelihood, in and of itself have been dispositive of the issue presented herein. Since the probability of a unrelated nuclear DNA profile match is so infinitesimal as to be virtually nonexistent, such a match would in all likelihood be dispositive of the issue. But the mtDNA testing performed in this case, while not having an infinitesimal probability is still probative and still has a probability of less than 1% of a match. The mtDNA testing did not exonerate Bass in any respect. It did not exclude Bass, and it did not put the verdict in question.

Here, the mtDNA partial profile match is not, in and of itself, dispositive because while less than a 1% probability of a match is low it is not virtually nonexistent. However, while not dispositive, the new mtDNA evidence does undermine Bass' claim of actual innocence. Consequently, in this case, the mtDNA partial profile match to Bass must be considered in conjunction with all the other facts and circumstances presented herein.

With the exception of the overstatements of the MHC expert, all other aspects of the State's case against Bass remain in place. The re-test results of the MHC evidence do not exonerate Bass in any respect. There have been no new discoveries of any factual evidence that calls into question the verdict. No physical evidence has surfaced that undermines the State's case against Bass.

As to S.K., any actual innocence claims are undermined by the re-test of the MHC evidence of the mtDNA test results. Moreover, S.K. identified Bass as her assailant at trial.

As to A.S., she positively identified Bass as her assailant prior to trial and at trial. She even correctly noted that Bass had gained weight after her assault and was now heavier at trial.

As to S.M., no MHC evidence was ever introduced at trial. Christine Shaw passed S.M.'s assailant in the hallway and positively identified Bass as the assailant prior to trial and at trial. Roger Reynolds also identified Bass as the man he saw in the bathroom stall following S.M.'s assault but because of his limited view, his identification was not "definitive."

In addition to the identification of Bass as the assailant by the victims and/or eyewitnesses, certain repetitive conduct and common characteristics of the assailant led to Bass' arrest in November 1982, his indictment for each of the three criminal attacks in January 1983, and his trial and convictions in June 1983.

Loretta Schoell's testimony established that Bass lived near the attacks when they occurred. Schoell's testimony further established that Bass dressed professionally when he committed his crimes and that he was familiar with A.S. and S.M.'s offices because Bass had stolen checks from each office before. The dictation machine found in Schoell's car, which matched the description of the dictation machine stolen from A.S.'s workplace, also linked Bass to A.S.'s attack.

All three attacks were temporally and geographically close to each other. Similarities in the *modus operandi* of the attacks linked them to Bass. Indeed, the Delaware Supreme Court noted the similarities in the attacks in affirming Bass' convictions on direct appeal.²⁰⁸ The victims, all young females, were attacked by a well-dressed black male. They were attacked while alone in their offices in the North Wilmington area. In each instance, the assailant was dressed well and could blend into an office environment. Both Bass and Schoell corroborated that Bass dressed nicely when committing crimes in office buildings and tried to blend into the office environment. In each instance, he subdued each victim by suddenly approaching her and shoving either a screwdriver into her side or clamping his hand over her mouth. In each instance, he demanded the victims' money and jewelry. He ordered each victim not to look at him or stayed behind her so she could not see him. All three victims described their assailant as a black male

²⁰⁸ Superior Court Docket No. 129, Defendant's Appendix at A700.

between 20 and 30 years of age, of medium height, slender build and with a deep voice.

After taking the victims' money and jewelry (S.M. had no money) the assailant then forcibly took each victim to a secluded area within her workplace to continue the attack. He threatened both S.K. and A.S. with a screwdriver. He tied all three victims similarly with materials he found at their offices. The assailant raped A.S. and S.K., while S.M. apparently escaped the same fate by losing control of her bladder while tied up and confronted by her assailant. In both instances where he raped the victims, he could not maintain an erection. In two of the three attacks, a sweater was used to cover the victim's head and later to gag her. In A.S.'s and S.M.'s attacks, the assailant wore gray loafers.

S.K. testified in detail about her robbery and rape and identified Bass as her assailant at trial. A.S. testified in detail about her robbery and rape and selected Bass from a photo lineup as the person who looked most like her assailant. At trial, A.S. again identified Bass as the person who had attacked her but recognized that he had gained weight. Bass had, in fact, gained weight from the time of his arrest (which was a few months after the attack), about 15-20 pounds, to the time of the trial. As to S.M.'s attack, Christine Shaw identified Bass from a photographic lineup and in court as the person she saw exiting S.M.'s office

moments after the attack. Roger Reynolds also identified Bass from a photographic lineup as the person he possibly saw in the men's room shortly after the attack.

In this case, the State presented a substantial case against Bass besides the MHC analysis. The hair evidence was by no means the only evidence supporting the conviction in this case. Bass has not met his burden to establish that without the testimony of the MHC expert overstating the MHC evidence there is a strong inference that he is actually innocent in fact of the acts underlying the charges for which he was convicted.

There was strong direct and circumstantial evidence demonstrating Bass' guilt. Bass' trial would not have been different without Agent Podolak's inadmissible testimony overstating the MHC evidence in view of the substantial evidence of Bass' guilt, and the re-testing of the hair for a MHC comparison and mtDNA testing.

The issue of the MHC expert overstating the MHC evidence at trial has arisen and was addressed in other Delaware cases.

One of those cases, *Crump*,²⁰⁹ is at one end of the spectrum. In *Crump*, although the USDOJ/FBI advised in 2015 that the FBI hair and fiber expert's testimony at that trial in 1984 was flawed, the recent DNA testing performed in

²⁰⁹ *State v. Crump*, 2017 WL 6403510 (Del.Super.), *aff'd*, 2018 WL 3769261 (Del.) *cert. denied*, 139 S.Ct. 1400 (U.S. 2019).

that case positively identified the defendant as the contributor and therefore undermined any actual innocence claim.²¹⁰

On the other end of the spectrum is the *Daniels* case.²¹¹ In that case, in addition to the revelation that the MHC was flawed, the factual evidence was also determined to be flawed. Based on the “unique” facts and circumstances of that case, the State moved to dismiss that indictment “in view of its broader responsibility for the integrity of the criminal justice process and in the broader interests of justice.”²¹²

The *Daniels* case involved a stranger-rape case. The trial was held in 1980. The victim, a fifteen-year-old female, left a party with a male companion and went up to the elevated railroad tracks at the corner of Augustine Cut-Off and Lovering Avenue in Wilmington, Delaware. The male who accompanied the victim was intoxicated. The male testified that they were engaging in sexual intercourse at the railroad tracks, but the victim denied that they were having sex. A male approached them, identified himself as a security guard for the railroad, then threw the victim down, choked her and raped her. The male companion fled.²¹³

²¹⁰ *Id.*

²¹¹ *State v. Elmer Daniels*, ID No. 87002394DI.

²¹² Superior Court Docket No. 136, letter to court supplementing the record with the State’s Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*.

²¹³ Superior Court Docket No. 136, letter to court supplementing the record with the State’s Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI; *Daniels v. Redman*, C.A. No. 82-27, slip op. (D.Del. May 3, 1982)(denying petition for habeas corpus relief).

The male companion made a number of conflicting statements to the police and at trial. The various statements made to police by the witness were a matter of dispute both at trial and in the ensuing years. The male companion had not identified Elmer Daniels as the attacker until he was, himself, threatened with prosecution for third degree rape. After he was threatened by the police, the male identified the assailant as Elmer Daniels because he claimed that he knew Elmer from being in the same 8th grade homeroom class at Bayard Middle School.²¹⁴

The male companion made so many conflicting statements that the one fact about which the prosecutor and defense agreed at trial was that he was a liar.²¹⁵ The prosecutor stressed at trial that nothing the male companion said should be believed unless it could be backed up.²¹⁶

The male companion's identification of Elmer Daniels as being a classmate of his was confirmed by a teacher at that school for the police prior to trial. However, newly produced school transcripts reflected that this was, in fact, incorrect. It was Elmer Daniels' brother, not Elmer, that attended the same school during the periods of time that overlapped with the male's attendance there.²¹⁷

²¹⁴ *Id.*

²¹⁵ See, *Daniels v. Redman*, C.A. No. 82-27, slip op., at *4 (D.Del. May 3, 1982)(denying petition for habeas corpus relief).

²¹⁶ *Id.*

²¹⁷ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 1, 4-5, 15-16.

In addition, a coat and pants had been seized from Elmer Daniels' house (where he lived with his mother and several brothers) which matched the description of those allegedly worn by the assailant. Fingerprints from the items in that coat which were collected during the 1980 investigation were re-examined. At trial, neither side sought to introduce fingerprint evidence. The initial report made it clear that some of the prints were not Elmer Daniels, but it was inconclusive as to who those prints belonged to. After the re-analysis of the fingerprints, and presumably with the benefit of additional fingerprints in its files accumulated over the intervening 39 years, the FBI was able to identify the fingerprints on the items in the coat pocket as belonging to Elmer Daniels' brother, not Elmer Daniels.²¹⁸

Elmer Daniels asserted an alibi defense. The FBI hair and fiber expert testified at trial that the hair evidence was a "double-match." The FBI expert testified that a head hair removed from the victim's panties "either came from Mr. Daniels or it came from another negroid individual whose head hairs exhibit exactly the same individual microscopic characteristics as the head hairs of Mr. Daniels and who was in a position to have his head hairs deposited on those panties." The FBI also testified that a pubic hair fiber found on the pants taken

²¹⁸ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 10-11.

from Mr. Daniels' bedroom "matched the pubic hairs as being from the victim in all microscopic characteristics. . . ." ²¹⁹

The FBI agent testified that these two separate independent events, a double-match, increases the personal identification of the person. The FBI agent testified that: "He had never had a case where there's been a double match. The victim's hair on the defendant, the defendant's hair on the victim, never had a case like that where they weren't the people who he said they were." ²²⁰

The hair evidence supporting that MHC expert testimony at trial in the *Daniels* case was no longer available for further testing. ²²¹

In *Daniels*, all the strands of evidence that the State relied upon to prove that Elmer Daniels was the rapist were materially compromised. The identification of Daniels as the rapist was undermined by the newly discovered school records. The fingerprint evidence undermined that it was Daniels that was wearing the clothes that matched the description of the clothes that the rapist wore. The MHC evidence was unavailable for further testing and the FBI MHC expert testified at

²¹⁹ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 5-8, 14-15.

²²⁰ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 5-8, 14-15.

²²¹ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 2-3.

trial that when there was a double-match, he has never been wrong in the personal identification.

In the *Daniels* case, in the State's closing summation it emphasized just how strong the hair evidence was and that "all the alibi witnesses in the world aren't going to get around that." The MHC testimony at the trial specifically and dispositively refuted Daniels' alibi defense.²²²

Now, 40 years later, the State determined that at this late juncture it was impossible to disentangle the invalid scientific testimony from the limited remaining evidence, which had all been called into question. Based on the unique combination of facts and circumstances set forth in the *Daniels* case, the State sought to dismiss the indictment against Daniels.²²³ Where all the strains of key evidence the State used to prove that the Defendant was the assailant is called into question, the conviction should be set aside.²²⁴

Bass compares his case with how the Delaware Department of Justice handled Elmer Daniels' case. Bass argues his case is similar and his charges should be dismissed. The Court disagrees.

²²² Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI, at pgs. 14-15.

²²³ Superior Court Docket No. 136, letter to court supplementing the record with the State's Brief in Support of its Motion to Dismiss the Indictment in *State v. Elmer Daniels*, Case No. 87002394DI.

²²⁴ *Fowler v. State*, 194 A.3d 16, 18, 26 (Del. 2018).

This case must be decided based on the unique facts and circumstances presented herein. In this case, with the exception of the overstatements of the MHC expert, all other aspects of the State's case against Bass remain in place. The re-test results of the MHC evidence do not exonerate Bass in any respect. There have been no new discoveries of any factual evidence that calls into question the verdict. No physical evidence has surfaced that undermines the State's case against Bass. The State's case against Bass through direct and circumstantial evidence was substantial and remains in place.

Bass' case does not fall at either end of the spectrum. Bass' case is not the same as *Crump*, where a full DNA analysis was conducted and there was a match, which was in and of itself dispositive of the case. Nor is Bass' case the same as *Daniels'* case, where in the *Daniels* case every aspect of the State's evidence was called into question. Nothing in the record, and none of the recent retesting of the MHC evidence, has exonerated Bass in any way.

Bass has not overcome Rule 61(d)(2)(i)'s procedural bars based on other evidence of his guilt. Bass has not met his burden to establish that the inappropriate statements by the FBI's hair and fiber examiner, and a new understanding in forensic science regarding the limits of MHC analysis for individual identification, constitutes new evidence creating a strong inference that

he is actually innocent. Bass has also failed to establish that the unreliable science evidence at trial violated his due process rights.

CONCLUSION

Defendant Alan Bass' Rule 61 motion is denied pursuant to Rule 61(d)(2)(i). Bass has not met his burden to establish that the new understanding in forensic science regarding the limitations of MHC analysis for individual identification constituted new evidence creating a strong inference that he is actually innocent. Bass also has not established that the unreliable scientific evidence at trial violated his due process rights.

For all of the foregoing reasons, Alan Bass' Motion for Postconviction Relief should be DENIED.

IT IS SO RECOMMENDED.

/s/ Lynne M. Parker
Commissioner Lynne M. Parker

cc: Prothonotary